

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK: CIVIL TERM: PART 3
3 -----X

4 PEOPLE OF THE STATE OF NEW YORK, BY LETITIA
5 JAMES, ATTORNEY GENERAL OF THE STATE OF NEW
6 YORK,

7 PLAINTIFF,

8 -against-

Index No:
451625/2020

9 THE NATIONAL RIFLE ASSOCIATION OF AMERICA,
10 INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN
11 FRAZER, and JOSHUA POWELL,

12 DEFENDANTS.

13 -----X

14 Status Conference

15 Via Microsoft Teams
16 December 10, 2021

17 B E F O R E:

18 THE HONORABLE JOEL M. COHEN
19 J U S T I C E

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Appearances Continued on next page:

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VANESSA MILLER
Senior Court Reporter

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1 THE COURT: All right. Well, we have a variety of
2 issues. Let me just hit a couple quickly just so I make
3 sure.

4 I know the parties were intending to propose a new
5 discovery schedule, I don't know that I received it yet.

6 MS. CONNELL: Your Honor, you did.

7 THE COURT: Maybe I just missed it.

8 MS. CONNELL: Your Honor, you did, and I believe
9 you already signed it, so that's been taken care of.

10 THE COURT: All right. Check that one off.

11 This is an overarching point, especially given that
12 there's going to be more discovery. The issues we'll deal
13 with today, we'll certainly go through. I think in order to
14 be responsive to you all, I am going to raise again the
15 question of a Discovery Master, at least, just to get you
16 through the end of discovery. I do have a particular
17 recommendation in mind of one of my colleagues who retired
18 recently who is Judge Peter Sherwood, who is, in my
19 judgment, a very good candidate for this kind of thing. So
20 I would ask you to think seriously about that because he'd
21 be able to -- I know I'm writing a check on his account on
22 this point, but he would be able to be more responsive, I
23 think, than I will be able to as best that I can just
24 because of the docket size. You hadn't had a lot of
25 discovery fights, but if I can read the winds correctly,

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1 that's starting to change a bit.

2 All right. So let's go through some of these
3 issues. I have thought about them, I'll give you my
4 thoughts and then let you, at least the side that's on the
5 wrong side of those thoughts, can argue about it. The
6 motion to dismiss the NRA's amended counterclaims, we
7 obviously have a bit of a confusing situation. I am not
8 going to prohibit the Attorney General from seeking to
9 dismiss the counterclaims, and so that can proceed. I do
10 understand the somewhat confusing aspect of it.

11 There was an answer with counterclaims, then there
12 was an amended complaint. And so does that start us anew?
13 I think the answer is arguably not because counterclaims are
14 independent of the complaint and you can keep counterclaims
15 alive in any event. But there was a new pleading, and I can
16 understand what was going through the Attorney General's
17 office's mind as to whether and when they had to respond to
18 it. So given the general principle that things should be
19 resolved on the merits rather than through foot faults and
20 like, I'm going to permit that briefing to go forward.

21 And what else needs to be decided on that? I take
22 it that waiting for my view on that has kind of stopped
23 things.

24 Ms. Connell, do you want to --

25 MS. CONNELL: Your Honor, it's just a matter of

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1 setting a briefing schedule on that. We've said we're happy
2 to proceed with our previously-filed motion to dismiss,
3 that's already been on the docket for many months.

4 THE COURT: So did they change their counterclaim
5 at all in response to the amended?

6 MS. CONNELL: Very little, your Honor. To the
7 extent they raised any of those changes as somewhat -- as
8 material in a way that we didn't see it, I may ask for a
9 couple of extra pages in the reply, but --

10 THE COURT: Right. But, again, the First
11 Department law is pretty clear that the movant has the right
12 to apply on their existing motion to an amended pleading.

13 So I guess turning to the counterclaim plaintiffs,
14 how long -- obviously, this has been out there for a while.
15 How long would you need to respond? You guys are the
16 counterclaimed plaintiffs on my left here, right?

17 MS. EISENBERG: Certainly, your Honor.

18 THE COURT: Can I just ask you to go to the mic?

19 MS. EISENBERG: Yes, I would be happy to.

20 Your Honor, to answer your question, we would like
21 30 days to respond. However, to preserve the record, we
22 think that the motion would be untimely, we reserve all
23 rights to object to it on the ground. And we also think
24 that the Attorney General defaulted, basically, and we are
25 entitled to move for default because her reply was due three

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1 months ago.

2 THE COURT: Okay. There's actually no formal
3 motion in front of me. The issue was raised, I'm giving you
4 my thinking on it, which is why I assume you all sent me
5 letters about it, and I don't think default is the
6 appropriate response. But if you want to make a motion, you
7 obviously preserve your record. The thing about these
8 letters are they're not motions and there are no orders. So
9 if you want to make a motion or make that part of your
10 opposition, then you're perfectly fine to do it, but --

11 MS. EISENBERG: And I appreciate it very much, your
12 Honor.

13 What about the fact that they still haven't filed a
14 reply? Does the Court agree that their reply should've been
15 filed?

16 THE COURT: Reply to what?

17 MS. EISENBERG: To our counterclaim.

18 THE COURT: Well, they've moved to dismissed this;
19 right?

20 MS. EISENBERG: But they didn't seek to apply that
21 motion to the counterclaim but for the deadline for their
22 reply, and the rules are very clear 20 days after, you have
23 to reply unless you move before and they didn't.

24 THE COURT: Well, but the rule is is that the
25 party can -- you're saying they didn't tell me in time that

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1 they were going to apply their motion to the new one?

2 Okay. Look, there are plenty of grounds in the CPLR for me
3 to permit some leeway from this kind of confusion, which is
4 a little --

5 You know, you can make whatever motion you want is
6 the bottom line. I don't think that default is an
7 appropriate response to what happened, but go for it.

8 MS. EISENBERG: Certainly, your Honor.

9 I think, you know, obviously, a motion for default
10 is Draconian remedy and we would like to have to avoid to
11 move for that, but we've been prejudiced, the NRA has been
12 prejudiced because we don't know what she denies, what she
13 admits, what she says she doesn't know anything about and
14 what --

15 THE COURT: Well, but a motion to dismiss is
16 instead of that, and if they lose their motion to dismiss,
17 then you get an answer. That's the way it works; right?

18 MS. EISENBERG: Right. But we have a note of issue
19 date coming up and --

20 THE COURT: Well, there's another thing in the mix
21 here where I -- my understanding was that the parties have
22 held off on discovery on the counterclaim until the motion
23 to dismiss was decided, which I think -- I'm not a big fan
24 of stays, but in this case, you've got enough to do on the
25 main claim that I would be okay with a discovery proceeding

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1 in two tracks on that, as long as we end up being finished
2 without too much delay.

3 I mean, I'd like to get this briefed quickly and
4 decided quickly so we can get on with it. So you won't be
5 prejudiced in the sense that there should not be a note of
6 issue filed with respect -- that covers the counterclaim
7 until we have a discovery schedule, and it expires on the
8 counterclaim; right? So whatever your discovery schedule
9 is, and I don't remember it as I sit here right now, does it
10 make provision for discovery on the counterclaim?

11 MS. EISENBERG: No, your Honor. It assumes that
12 all discovery will be done.

13 THE COURT: All right. Well, we need to amend
14 that, because, again, there's so many letters coming my way.
15 I believe that one of them suggested that we have an
16 extension of the discovery time for the counterclaim.

17 MS. EISENBERG: Your Honor, respectfully, under the
18 Commercial Division rules there is no stay. It's their
19 burden to show why a stay is required. I can see why it was
20 prudent to have a stay back in June, but, you know -- or
21 July, apologies, so many months later. And what we're
22 effectively doing is guaranteeing that there's going to be
23 further delay and my client wants to have this case tried
24 and be over with.

25 THE COURT: I understand. Well, you know, stays

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1 are discretionary. Again, we're dealing still with letters
2 and me giving you comments. If you all need to make a
3 motion for a stay or a motion to amend the discovery
4 schedule, go ahead. I'm just telling you my strong
5 inclination is to proceed promptly with the briefing on the
6 motion given that the discovery, it seems to me, does not
7 overlap really in any material way. And to the extent it
8 does overlap, it's already being done. I would hold off on
9 the unique discovery in connection with the counterclaim
10 until I determine whether it's a viable claim.

11 So you can make the motion. I'm just telling you
12 that unless you come up with something, I haven't thought of
13 yet, that's the way I'm going to go. So it's a question of
14 how you want to spend your time and money. Okay. But I do
15 think you then need to either make a motion for a stay of
16 discovery on the counterclaim along with a proposed
17 discovery schedule. I think it would be a lot more
18 efficient for all of you, having heard what I just said, to
19 just come up with an amended schedule. But I don't have the
20 ability to stop people from making motions. So there you
21 go.

22 Let me turn to the Powell documents, which is an
23 interesting conundrum. Is that Mr. MacDougall?

24 MR. MACDOUGALL: Yes.

25 THE COURT: Can we switch sides for a second?

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1 I'll tell you what I think makes sense and then you can -- I
2 think that the privilege calls on NRA documents should be
3 made by the NRA's counsel. The privilege belongs to the
4 NRA, not to Mr. Powell, which really just leaves the logical
5 question of a logistical question of how we do that.

6 It seems to me, Mr. MacDougall, that Akin Gump
7 should be able to delineate in its document review any
8 communications that might be Mr. Powell privileged, meaning,
9 conversations between Mr. Powell and yourself or anyone
10 else, and, certainly you can review all of that. And I
11 assume you can also, through metadata, search for any
12 documents where the only people on it are Mr. Powell and
13 lawyers for the NRA. And it seems to me those documents
14 should be sent to the NRA for review to make privilege
15 determinations, because, effectively, it seems to me
16 documents that Mr. Powell sent or received on his NRA e-mail
17 belong to the NRA, not Mr. Powell. He may have custody of
18 them and, therefore, have an obligation in discovery to
19 produce any that are non-privileged, but that decision, in
20 my opinion, should be made by the NRA's counsel.

21 So with that, let me let you go.

22 MR. MACDOUGALL: Yes, your Honor.

23 There's really just two equities we're trying to
24 protect with regard to our client --

25 THE COURT: And you don't want to be disqualified,

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1 which I understand.

2 MR. MACDOUGALL: That's the first one, and that's
3 a big one, yes, your Honor.

4 THE COURT: But the way I'm describing it, the
5 only basis I would think that they could possibly argue is
6 if you looked at privileged documents, but since you're not
7 going to be doing the privilege review, you're just going to
8 be identifying those that go to the NRA for the initial
9 review, that issue shouldn't come up.

10 MR. MACDOUGALL: Well, except, your Honor, for the
11 second issue, which is that, A, we haven't looked at them
12 for the reason the Court just articulated, and they're a mix
13 of e-mails, text messages. Mr. Powell was heavily involved
14 with the Brewer firm's work. So there's a lot of chatter, a
15 lot of recollections and reflections, and it actually
16 crosses over into the period of time when he had his own
17 counsel.

18 So the second concern we have is that -- and I
19 guess the preset for this, and this may not have emerged yet
20 in the litigation, Mr. Powell is not aligned at all with the
21 NRA --

22 THE COURT: I got that.

23 MR. MACDOUGALL: The only thing he has in common
24 is he's on the same side of the "V" --

25 THE COURT: But I think the kind of documents

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1 matter. E-mails, even if there's an e-mail string, I assume
2 that the metadata will help you figure out, because the only
3 thing you're solving for is if there's an e-mail string
4 between, let's say, Mr. Powell and the Brewer firm, and in
5 the middle of it, he sends an e-mail to his own counsel
6 saying, Well, what do you think of all this, that would
7 be -- the metadata on that would be distinguishable because
8 it would then be the top of the chain would be an e-mail
9 between Mr. Powell and his counsel. And it just means once
10 you do that, you shouldn't read the rest of this and then
11 you can take the position that that top one is privileged
12 and not produce that to the NRA for their review.

13 I think text messages is a little more complicated.
14 I just had a trial where exactly -- you know, whether you
15 waived them and they're indistinguishable and the metadata
16 probably get all confused. So the question is how do you
17 deal with that.

18 MR. MACDOUGALL: And I think I have a proposed
19 solution that will accommodate the Court's concerns.

20 THE COURT: Okay.

21 MR. MACDOUGALL: And this is sort of, a you know,
22 a segue from me doing the criminal side where the thinking
23 is that the Court is familiar with. We would have a lawyer
24 in our firm uninvolved with the representation of Mr.
25 Powell, a former federal prosecutor, look through everything

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1 and make the cut and not disclose to us anything that she'd
2 found. We would turn over, at the Court's discretion,
3 documents that are NRA-privileged documents to the NRA, and
4 we would do that and preserve, through the metadata
5 analysis, what belongs to Mr. Powell and what belongs to --

6 THE COURT: I mean, that seems sensible to me. I
7 guess the question is would that person need to review
8 documents that the metadata show are simply between Mr.
9 Powell and NRA counsel.

10 MR. MACDOUGALL: Probably not, depending on who
11 else is on the e-mails.

12 THE COURT: Well, yeah.

13 MR. MACDOUGALL: You know, that's why it's --

14 THE COURT: Yeah. Look, that seems to me to be a
15 rational compromise and a practical one, which is if there
16 is a doubt when they look at the metadata as to whether it's
17 privileged or not, or whether it's a communication with
18 counsel or not, having somebody who's walled off to take a
19 look at it and make the initial question of whether it
20 raises any issue at all. But I don't think the person
21 should be reviewing -- or needs to be involved with
22 documents where, on its face, it's just a communication
23 between Mr. Powell and NRA counsel. And the ones where it
24 may or may not be, where it may have Mr. Powell and counsel
25 and other people, I think that's one where it would make

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1 sense to me, without harming Akin Gump's ability to
2 continue, to have some walled-off person just look at it and
3 say, yeah, this should go be to the NRA, this is an NRA
4 privilege issue, or, actually, this has nothing to do with
5 that, or -- the real concern is if it includes Mr. Powell
6 privileged information.

7 Now it's not clear to me how a document that
8 includes, as a recipient or a sender, Mr. Powell, NRA
9 counsel and then other people would be privileged as against
10 the NRA, but does the NRA have any objection to that
11 approach?

12 MS. EISENBERG: Yes, your Honor, we do.

13 THE COURT: Can you switch positions for a second?
14 You can be a juror for a couple of minutes if you want. If
15 you want to sit closer, it's up to you.

16 MS. EISENBERG: Your Honor, we completely agree
17 that it is the NRA who should be reviewing its
18 potentially-privileged documents with privilege, if anything
19 because, we know we have the institutional knowledge and the
20 context to assess the communications --

21 THE COURT: Right.

22 MS. EISENBERG: -- often times.

23 THE COURT: There's no disagreement. It's just a
24 question of how do they handle the practical question of,
25 you know, they shouldn't necessarily pick up the entire set

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1 of his documents and send them to you because it might
2 include privileged documents of his own.

3 MS. EISENBERG: Right. And they should be able to
4 isolate those and give us everything that involves
5 communications with the NRA's lawyers.

6 THE COURT: Right. And some parts can be
7 isolated. But from my experience, especially with text
8 strings and multiple e-mails, there may be some subset where
9 it's not as obvious, and so we're just trying to solve for
10 that.

11 MS. EISENBERG: Right. I think we need to
12 understand more specifically what technology they are using
13 and if it's, in fact, unsolvable on their end, given the
14 technology that they use, given my experience, that is
15 something that I have been able to solve.

16 And also just to understand what's the timing,
17 because in their letter, they just say, like, they may be
18 privileged. I don't understand why Mr. Powell would be
19 forwarding privileged communications along to the NRA to a
20 third party. So it's also their premise that those
21 communications have privilege, but I question that.

22 THE COURT: Well, Mr. MacDougall is in a difficult
23 position because he hasn't read them yet. So we're just
24 trying to get over the hurdle of them being concerned, and
25 which I understand --

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1 MS. EISENBERG: Right.

2 THE COURT: -- if they go down this road and they
3 read privileged stuff, then somebody may argue that -- I
4 don't want that.

5 So let me just give you the guidance and then you
6 should be able to work it out. I agree that for documents
7 that are identified as potentially privileged on behalf of
8 the NRA, that the NRA should make that decision and that any
9 documents that Akin Gumps, when you look at them, they just
10 have Mr. Powell and NRA counsel and just other NRA people,
11 but that's it, that the NRA should be able to make the first
12 call on that. There will be some judgment calls, it seems
13 to me anyway just the messiness of documents in general,
14 where, in good faith, somebody at Akin Gumps should be able
15 to look at it and say, Well, look, based on the metadata,
16 it's not clear so why don't we have this formal prosecutor
17 look at it. And if it is, in fact, Powell privileged for
18 whatever reason, then they can take that position, but if
19 there's any doubt as to whether it's privileged, that call
20 should be made by the NRA if it's an NRA privilege.

21 So I just want you to work out a logistical plan to
22 do that. I don't think anyone should put themselves in a
23 position to stop representing Mr. Powell just because
24 they're trying to solve this in a responsible way; okay?
25 So that's what I'd like you to do. If you call for

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1 something reasonable, Akin Gump should be comfortable. I'm
2 not going to disqualify them for following my own rulings as
3 to how to find something out. And if this prosecutor
4 happens to see something that she looks at and says, Oh, my
5 gosh, this was privileged, she's not part of this team
6 anyway. So I think that's a practical way to do it.

7 MS. EISENBERG: Right.

8 If I may, your Honor, like, I don't understand why
9 Mr. Powell may have forwarded privileged communications to a
10 third party. It may be that he exceeded his authority.

11 THE COURT: That would be -- it's a different
12 thing. So we can come up with lots of hypotheticals, but it
13 could be that Mr. Powell got a non-privileged document that
14 included the Brewer firm and Ackerman and 5,000 other people
15 and then sent that to Akin Gump for advice. Now, whether he
16 sent it on the NRA's server, there's other issues there.
17 But as you and I sit here right now, we don't know what
18 permutations might exist, it's all I'm saying. I'm trying
19 to be practical.

20 It sounds like Akin Gump is trying to work this in
21 a responsible way. If there is an issue as to whether it
22 could conceivably be either privileged from Mr. Powell's
23 perspective, or he would be at risk of not producing
24 something that they believe is not privileged. But in the
25 first instance, that decision should be an NRA call.

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1 MS. EISENBERG: Certainly, your Honor.

2 I think, like I said, opposing -- not opposing
3 counsel, but co-defense counsel does not have ability to
4 really speak about what's in those documents because he
5 hasn't looked at them.

6 THE COURT: Correct.

7 MS. EISENBERG: But what he does have the ability
8 to do and speak to his own client to understand a little bit
9 better about the context in what are in these e-mails. So
10 what I would ask for is, as we try to work through it
11 practically which is what the NRA would like to do as well,
12 is we'd like to get a little bit more information about the
13 timing and who and why and so that the technical -- so that
14 the technology can be leveraged to the fullest extent.

15 THE COURT: Okay. Well, I would imagine they
16 would be fine having a conversation. And I would be
17 surprised if you can't work this out. I'm just telling Akin
18 Gump that if we do a reasonable approach, I'm not going to
19 disqualify you if there's some inadvertent thing that
20 happens with respect to somebody who's not on the litigation
21 team, and I think you'll work it out.

22 MS. EISENBERG: Yes, your Honor.

23 THE COURT: All right. The next thing on my list
24 is the --

25 MS. CONNELL: Your Honor, I'm sorry.

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1 THE COURT: Oh.

2 MS. CONNELL: Can I speak?

3 THE COURT: You have a horse in this race, okay.

4 MS. CONNELL: Your Honor, I'm not trying to throw
5 a fly in the ointment. This sounds great. We're just
6 trying to get these documents that we've been trying to get
7 for six months. Fact discovery under the two-month
8 extension we've already sought closes February 15th. We
9 already are waiting for documents that the NRA's been
10 reviewing for privilege from their independent auditor for
11 six months. So I would just ask, not that the Court can do
12 this today, but that we agree to reasonable timelines and
13 also cautioning --

14 THE COURT: Well, this should catch up. In other
15 words, whatever's going to happen with these documents
16 should be no more delayed -- well, the NRA's review, I don't
17 know what the volume is, but they presumably -- if these are
18 documents he sent or received from his NRA dot whatever
19 e-mail, the NRA presumably already had them in their
20 privilege review already. And if they are using any kind of
21 a reasonable search platform, they'll be able to tell that
22 they've already done a review of these same things, I would
23 imagine.

24 MS. CONNELL: That's true.

25 There is another e-mail account, at least one that

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1 was used. I hope that will work, but I just wanted to bring
2 that to the Court's attention.

3 THE COURT: Yeah. Look, I have not gotten my hand
4 into how long this is taking, which is why Judge Sherwood,
5 or somebody, would be an excellent candidate to watch over
6 this. That does sound like a long time, but I'm sure the
7 defendants have all sorts of reasons why it has been.

8 So the short answer is I am not looking at what we
9 just talked about where Akin Gump is creating a sort of a
10 crack in the regular schedule. Everything should move
11 quickly and I can imagine that Akin Gump will cooperate to
12 get that to happen.

13 MS. CONNELL: I hope so, your Honor. But I would
14 want the parties to understand --

15 THE COURT: Well, hope springs eternal.

16 MS. CONNELL: The second thing is there is a
17 concern -- and just the fact that the e-mail has the Brewer
18 firm on it doesn't mean it's privileged. The prior firm
19 does a lot of non-privileged --

20 THE COURT: I completely agree. The only question
21 is who makes the initial determination on privilege and
22 that, as you know, is the client. Not the -- you know, it's
23 a company, not the individual.

24 MS. CONNELL: We're happy we have a system where
25 we'll get all the documents, and I'll note that exception.

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1 THE COURT: I wouldn't get happy yet because it
2 hasn't happened, but let's hope.

3 MS. CONNELL: Thank you, your Honor.

4 THE COURT: The Cox arbitration documents, I don't
5 know who's going to -- who are the combatants on this. It
6 does seem to me that a subpoena in a lawsuit is, "unless
7 otherwise required by law". So that the fact that people
8 agree to confidentiality in an arbitration does not mean it
9 is immune from subpoena. It may be something that would be
10 protected by the confidentiality order in this case so that
11 it doesn't go beyond the parties. But that's my initial
12 lean is that if it's relevant to a lawsuit, it can still be
13 discoverable.

14 I don't even know who the --

15 MR. SAXON: Your Honor, this is Matt Saxon for Mr.
16 Cox from the law firm of Winston & Strawn.

17 THE COURT: Okay.

18 MR. SAXON: Just to set a little bit of
19 background, Chris Cox was the head of the NRA's lobbying
20 group for about 20 years. He was, effectively, the
21 number-two person in the organization. He resigned in the
22 summer of 2019, was involved in arbitration with the NRA,
23 and then he was subpoenaed in this action by the New York
24 Attorney General, and the NRA objected to him producing
25 documents from the underlying arbitration.

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1 Cox has no objection to producing the documents,
2 but is caught in the middle a little bit of a dispute
3 between the NRA and the NYAG. On the one hand, we need to
4 protect our client against any claim from the NRA that he
5 violated any confidentiality provision. On the other hand,
6 we want to comply with the subpoena, obviously. And as you
7 may have seen in our letter, we question the NRA's factual
8 basis for claiming confidentiality based on some of the
9 things they said publicly about the underlying arbitration,
10 and I'm happy to get into that. I know it's been a long
11 morning, so --

12 THE COURT: Well, I don't know that the
13 document-by-document thing is ripe just yet; right? Right
14 now, there's just an overarching question about whether the
15 confidentiality provision, or restriction in connection with
16 the arbitration, broadly prohibits the Attorney General from
17 subpoenaing the information; am I correct that that's the
18 broader question?

19 MR. SAXON: Correct, your Honor.

20 THE COURT: And the confidentiality agreement, or
21 order, whatever it is in the arbitration, does have an
22 exception for situations where production would be required
23 by law, otherwise required by law; right?

24 MR. SAXON: That's correct, your Honor.

25 THE COURT: And typically, in confidentiality

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1 agreements, at least in my experience, that means if you're
2 ordered by a Court to produce this, then you produce it.

3 MR. SAXON: Yes, we agree with that. And we cited
4 some cases in our letter that support that position, your
5 Honor.

6 THE COURT: Okay.

7 MS. EISENBERG: Thank you, your Honor.

8 THE COURT: Let's see what the NRA's views are.

9 MS. EISENBERG: First, if I may just go back for
10 one second.

11 As far as the Aronson documents, the representation
12 made by opposing counsel creates the impression that we have
13 been delaying certain productions, or late, but I certainly
14 disagree with that, but I know that the Judge doesn't want
15 us to get into that right now. Just for the record, I
16 dispute that impression that was created.

17 THE COURT: Okay.

18 MS. EISENBERG: Now, in terms of Mr. Cox's
19 documents, to be clear, the NRA from fairly early on said
20 that we have no objection to Mr. Cox or the NRA producing
21 the documents that were produced in the arbitration by Mr.
22 Cox through the NRA or by the NRA to Mr. Cox, and the
23 Attorney General expressly rejected that offer. So what
24 they're really asking for --

25 THE COURT: You're talking about the underlying

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1 documents that were exchanged?

2 MS. EISENBERG: Right. Like, when he worked with
3 the NRA and he e-mailed people about --

4 THE COURT: Right. Well there would be no
5 argument --

6 MS. EISENBERG: Sorry?

7 THE COURT: There would be no argument not to
8 produce that anyway.

9 MS. EISENBERG: Right, right.

10 THE COURT: They're not really conceding anything
11 and neither are you because that --

12 MS. EISENBERG: Right.

13 THE COURT: The fact that something is exchanged
14 in an arbitration doesn't imbue it with more confidentiality
15 than it would either have or not have. I assume you're
16 talking about the litigation documents during the
17 arbitration briefing and the like?

18 MS. EISENBERG: Right. And I'm not willing to
19 concede the point that it's not work product or whatever.
20 But we offered to do that, we offered to turn over the
21 underlying documents, historical e-mails and texts. What we
22 object to is what you said, briefs, motions, things like
23 that. And we have a number of objections, including the law
24 that we cited. I appreciate the Court's comments about that
25 exception and I will take that into consideration.

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1 THE COURT: Let me just make sure I understand.
2 Mr. Saxon, can you just go on mute for a second? I think
3 we're getting some feedback from your line.

4 So what is it exactly -- if the underlying
5 evidence, the documents back and forth, is something that
6 will just have to be produced and it's either covered by the
7 confidentiality order in our case or it isn't, what is it
8 about the Court or the arbitration papers that is
9 qualitatively different? Presumably, the only thing that's
10 confidential are the facts, not the legal arguments.

11 MS. EISENBERG: No, it is the legal arguments
12 precisely because the NRA -- Mr. Cox agreed contractually
13 that any dispute arising out of his employment agreement
14 would be arbitrated through a confidential arbitration.

15 THE COURT: Okay.

16 MS. EISENBERG: And there's law that says that you
17 have to respect that. There's public interest in respecting
18 parties' expectation that it will remain confidential even
19 in the face of a subpoena.

20 THE COURT: All right. Just give me one second.

21 Do you not agree that the required-by-law exception
22 has been interpreted to apply that to include compliance
23 with the subpoena?

24 MS. EISENBERG: No, your Honor. Whatever cases
25 have been cited are distinguishable, and the cases that we

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1 cite are on point, and under those cases, it's not required
2 by law.

3 THE COURT: All right. Well, look, my lean would
4 be, in the absence of a motion, that it's probably
5 discoverable, that this sounds like one where you need to
6 have motion practice because it's a legal issue. It may be
7 a bit thorny.

8 If the AG just wants to give me their position.

9 MS. CONNELL: I do, your Honor. Thank you.

10 Your Honor, as an initial matter, we believe the
11 NRA has waived any confidentiality here. It produced
12 materials from the arbitration. In the bankruptcy, it
13 failed the bankruptcy proceeding, and it caused Mr. Cox to
14 produce the materials from the bankruptcy proceeding to the
15 unsecured creditors committee in the bankruptcy proceeding.
16 So it has waived confidentiality. There's not good-faith
17 basis to assert that.

18 The second thing is that there's a number of cases
19 that Mr. Cox and the AG had asserted that the
20 required-by-law provision clearly covers this, we literally
21 litigated this issue with the NRA and won. They cannot use
22 privacy and confidentiality agreements to avoid their
23 regulator and to avoid process-like subpoenas, and they've
24 been doing that to slow discovery in this action and we need
25 it to proceed.

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1 THE COURT: Well, I would just make a motion to
2 compel. I mean, the motion to compel -- I haven't heard
3 anything that makes me disagree with what you just said, but
4 without a motion, I can't issue an order.

5 MS. CONNELL: Your Honor, may I ask for -- I will
6 submit the --

7 THE COURT: You can do it by order to show cause.

8 MS. CONNELL: Okay.

9 THE COURT: You can have an expedited briefing
10 hopefully that you can agree on. But this should be, like,
11 no more than a week a side to write papers. Let's get it
12 resolved quickly.

13 MS. CONNELL: Perfect. Thank you, your Honor.
14 That's what I wanted to ask for.

15 THE COURT: All right. See how quickly we're
16 getting through these issues? If only the rest of the case
17 can go this fast.

18 The next thing I have on my list is the Attorney
19 General's responses and objections to the NRA's second set
20 of document requests.

21 MS. EISENBERG: Yes, your Honor.

22 THE COURT: Does this relate to the counterclaim?

23 MS. EISENBERG: No, your Honor.

24 THE COURT: It doesn't.

25 MS. EISENBERG: We disagree on that issue.

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1 THE COURT: All right. But it relates to the
2 counterclaim; right?

3 MS. EISENBERG: Well, that's their position.
4 That's not our position.

5 THE COURT: All right.

6 MS. EISENBERG: So, your Honor, just to frame the
7 issue, at the end of August of 2019, Letitia James made the
8 statement that the NRA is a criminal enterprise. She
9 repeated that statement in early September. We served a
10 series of requests on the New York Attorney General related
11 to those and other statements. In other words, if she had a
12 basis for making that statement --

13 THE COURT: Were these statements before she was
14 Attorney General?

15 MS. EISENBERG: Exactly.

16 THE COURT: Okay. And so what -- okay.

17 MS. EISENBERG: And so what we want to know is what
18 was the basis for her accusing my client of engaging in
19 crime on an enterprise level. If she had a basis for it, we
20 want to see what it was. If she did not, then the answer
21 should be simple. We don't have any of the documents.

22 THE COURT: Why would -- for the main claim in
23 this case, which is she's the Attorney General beginning on
24 a certain date, what's the relevance of whatever she said in
25 terms of with respect to the merits of this case?

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1 MS. EISENBERG: It goes to the credibility and the
2 motivation of the accuser, your Honor. It kind of harkens
3 back to the --

4 THE COURT: Well, again, why is that relevant?

5 MS. EISENBERG: Because that's who the accuser is
6 and her credibility is at issue.

7 THE COURT: Well, the office of the Attorney
8 General is the accuser -- well, is the plaintiff just to not
9 use charged terms. You know, I get it that there's a
10 counterclaim around some of that, but --

11 MS. EISENBERG: Even if we didn't have a
12 counterclaim, our defense is that it's a
13 politically-motivated lawsuit and this is somebody who went
14 ahead and accused the NRA of being a criminal enterprise
15 before seeing a single shred of evidence --

16 THE COURT: Well, let me ask you a hypothetical:
17 Let's assume you have a politically-motivated decision to
18 file a lawsuit that has merit; is that a defense? In other
19 words, if the lawsuit has merit, why does it matter why it
20 was brought? If it doesn't have merit, why does it matter
21 why it was brought?

22 MS. EISENBERG: Well, our point is that it doesn't
23 have merit, and --

24 THE COURT: So you'd win anyway.

25 MS. EISENBERG: Well --

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1 THE COURT: The question is when will her
2 statements be, in any way, a deciding factor. Either the
3 claim has merit, in which case, whatever statements were
4 made before she was Attorney General -- it's hard to
5 understand why that would change the result. In other
6 words, otherwise, if those statements had never been made
7 and those views had never been held, the Attorney General's
8 office, the State of New York, would win. It's unclear to
9 me why statements in advance would change that result.

10 Is there some case you can cite as to why that
11 would be true?

12 MS. EISENBERG: Well, I don't have a case, your
13 Honor, but it's just, to me, it's through common sense. If
14 she had evidence that went to the issues at issue in this
15 case, whether it was negative evidence or exculpatory
16 evidence, it certainly relates to her claims here, and if
17 she didn't, it relates to her credibility. So for that
18 reason, our position is that the requests that we have
19 served are certainly germane to the Attorney General's
20 complaint against the NRA. But, in any case, that's another
21 reason why, separately, we request for a stay in the
22 counterclaims because it seems to be very one-sided.

23 MR. CORRELL: Your Honor, may I speak to that
24 point? Shall I go to the mic?

25 THE COURT: Yes, please. Otherwise, then the

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1 folks on the screen can't hear you.

2 MR. CORRELL: You asked for a case, the case is
3 cited in my reply papers, it's Pokoik versus Norsel
4 Realities, 55 Misc. 3d 1208(A), Supreme Court New York County
5 2017, and it was affirmed, it was modified. It's on Page 14
6 of my reply brief, but the problem is it says, "New York
7 Courts have held that because derivative actions bind absent
8 interest holders, they take on the attributes of a class
9 action and a plaintiff must therefore demonstrate that he
10 will fairly and adequately represent the interests of the
11 shareholders and the corporation and that he is free of
12 adverse personal interest or animus. If a plaintiff cannot
13 demonstrate such representation, the derivative causes of
14 action will be dismissed." So there are derivative --

15 THE COURT: So you're saying it's relative,
16 there's one derivative action at least that I'm aware of.

17 MR. CORRELL: I'm pointing out that there -- I'm
18 concerned, my client is also concerned, about having someone
19 driving a derivative claim on behalf of a corporation that
20 hasn't demonstrated animus to the corporation and is seeking
21 to dissolve the corporation in the same action.

22 THE COURT: Ms. Connell?

23 MS. CONNELL: Thank you, your Honor.

24 First, I just want to go back to something. The
25 discovery on the counterclaims was initially stated at the

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1 March 9th conference here with the NRA's agreement, okay.

2 And just to address Mr. Correll's point, Mr.
3 Correll has not moved or filed counterclaims or sought
4 discovery on these issues. And in regard to the relevance
5 of these demands, these demands that we're talking about
6 seek information like all the documents relating to
7 statements he made on this date or that date as a
8 campaigning politician for the position of the AG. The
9 Office of the Attorney General brought these claims, we have
10 produced our investigatory file to the parties. The
11 documents we have, everything we looked at, they have. So
12 the relevance of statements made on the campaign trail
13 relate only to claims against the Attorney General's office.
14 It cannot be said that we have not made specific factual
15 allegations of wrongdoing to support these claims.

16 And the idea that there may be -- their claims
17 against the Attorney General may suffice as a counterclaim,
18 that's separate entirely, but they have to litigate these
19 claims and see if they rise or fall on the proof we put
20 before the Court, and we've pled adequate claims. These
21 demands were made to the Attorney General in her official
22 and individual capacity as we learned through meet and
23 confers. They relate almost solely to the counterclaims.
24 There were two exceptions, which we at the Office of the
25 Attorney General responded to. And so, your Honor, I think

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1 there's no ground to go forward on these.

2 THE COURT: Yeah. Well, there's another one where
3 I can't issue an order because nobody's moved to compel at
4 this point and/or moved for a protective order. So I can
5 only arm twist so much. And at this point, I don't really
6 get it. I mean, I am interested in this question of
7 when -- to the extent that the Attorney General's office is
8 suing in a derivative capacity, might that give some grounds
9 for saying, because you don't see it a lot. But whether
10 somebody is in an appropriate representative is an issue.
11 I'm not saying that it raises this issue, but it's an
12 interesting point.

13 MS. CONNELL: I do think it's an interesting
14 point, your Honor. But, certainly the elected Attorney
15 General is vested by statute with the authority to vindicate
16 the interest of the State of New York, in protecting
17 charitable assets from waste from being basically stolen,
18 from being misused. That's what the legislature has
19 enacted; that's whom the people have elected, and we have
20 given them the evidence that we've relied upon to bring
21 these claims.

22 THE COURT: That's an excellent statement of the
23 countering point, but people bringing derivative actions can
24 be tested for adequacy. And, look, this is one where I just
25 need a motion, and maybe Justice Sherwood or maybe myself

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1 can unravel that. But again, these kinds of things, if you
2 want to wrap them up and have them decided quickly, I'm all
3 for that, and --

4 MS. CONNELL: Thank you, your Honor.

5 THE COURT: And the privilege log issue is the
6 last one, but I take it that is mooted, that there has been
7 no privilege log provided.

8 MS. EISENBERG: Yes, your Honor. But may I
9 approach?

10 THE COURT: Fire away. You still have a few
11 minutes left, but only a few.

12 MS. EISENBERG: Thank you, your Honor.

13 The privilege log for the production that was made
14 at the beginning of this year was given to us last week on
15 the eve of this argument --

16 THE COURT: Nothing like a hearing to cause people
17 to move.

18 MS. EISENBERG: Yes. Now, it was a categorical
19 privilege log which did not comply with the Commercial
20 Division rules because they specifically called for the
21 parties to meet and confer about whether or not the
22 categorical privilege log is going to be the approach. And
23 we're certainly willing to be practical and maybe amenable
24 to the categorical approach in some instance. We certainly
25 do not believe that the wholesale categorical approach is

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1 relevant, specifically because of the reasons that we were
2 discussing a minute ago about the allegations that the NRA
3 is criminal enterprise in August of September of 2018 before
4 the Attorney General became the Attorney General and saw a
5 single piece of evidence. So if and when she was talking to
6 lawyers about matters related to this investigation, we're
7 certainly entitled to know the dates and the parties with
8 whom --

9 THE COURT: You mean before she was Attorney
10 General?

11 MS. EISENBERG: Before she became Attorney General.
12 If she was talking to Governor Cuomo, for example --

13 THE COURT: Well --

14 MS. EISENBERG: -- about the NRA.

15 THE COURT: I don't know why that would be
16 privileged anyway. But when she was a private citizen,
17 you're saying?

18 MS. EISENBERG: Yes.

19 THE COURT: Well, look, I really don't want to try
20 to come up with hypothetical documents for this. You know,
21 generally speaking, people start with the categorical and
22 move to individual when we need to, otherwise, you all
23 would. And believe me, on your side, you probably have a
24 lot more privileged documents than they do and you're the
25 last people who are going to want to have to go document by

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1 document unless you're already doing that.

2 I don't feel like I have enough to sort of give
3 you, no, I will forbid them from doing categorical. One of
4 the nice parts of the rules was to permit that kind of
5 thing, really on both sides, to avoid what we've all gone
6 through in our professional lives spending thousands of
7 hours categorizing things. I'm hopeful you can find a way
8 to say, Look, X, Y and Z broad categories is fine, we have
9 some concerns about this category and we would like to have
10 you be more granular on that and then you would have a
11 specific thing to bring to my or Judge Sherwood's -- have I
12 mention him enough yet -- his attention, to have somebody
13 say, Well, look, here's what I think on this NRA thing. I
14 would certainly urge you all to do that here, and not sort
15 of -- it's not one way or the other, because that site
16 swings both ways, as they say. So, again, I'm trying to be
17 helpful.

18 MS. EISENBERG: You are. Thank you very much for
19 your comments, your Honor.

20 THE COURT: All right. I think that's all the
21 issues that I had on my list. I see either people agreeing
22 with that. So either people are exhausted or they agree
23 that we've covered everything.

24 -- I want to thank everybody. Very efficient and
25 well done argument. And as I said, I'll take the motions

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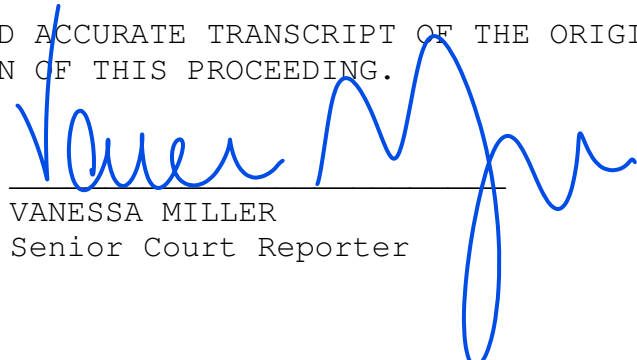
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1 under submission. And if there needs to be motions arising
2 out of these discovery things, then let me know. And I
3 would like you to get back to me within a few days as to
4 whether you're amenable to having Justice Sherwood operate
5 as a Discovery Master, I'd appreciate it -- so let's say by
6 Wednesday of next week.

7 Thanks very much.

8 *****

9 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL
10 STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

11 
12 VANESSA MILLER
13 Senior Court Reporter
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